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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 506.

SYSTEM FEDERATION NO. 59 OF THE RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, *Petitioner*,

v.

LOUISIANA & ARKANSAS RAILWAY COMPANY, *Respondent*.

RESPONDENT'S BRIEF OPPOSING THE GRANTING OF A WRIT OF CERTIORARI.

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September 10, 1941.

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v.

LOUISIANA & ARKANSAS RAILWAY COMPANY, *Respondent.*

RESPONDENT'S BRIEF OPPOSING THE GRANTING OF A WRIT OF CERTIORARI.

May it Please the Court:

I.

The Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals is reported in 119 Fed. (2d), 509, and that of the District Court in 30 Fed. Supp., 909, and 32 Fed. Supp., 89.

II.

Statement of the Case.

For the Court to pass on this petition requires a statement under the Court's rules (Rule 27, 2 (d), 83 L. Ed., 1646), which petitioner has not vouchsafed.

Petitioner sues as the representative of certain shop craft employees, some of whom are dead (R. 24), and as petitioner before the National Railroad Adjustment Board. It brought suit for alleged breach of the agreement of August 1, 1929, between respondent and its shop craft employees, and to enforce Award No. 281 of the Second Division of the National Railroad Adjustment Board. Attached to and made a part of the complaint were the August 1, 1929, agreement, as "Exhibit A", and the *October 20, 1937*, agreement between respondent and petitioner, as "Exhibit B"; also the proceedings before the National Railroad Adjustment Board, Award No. 281, as "Exhibit C".

The defense that the complaint failed to state a claim upon which relief could be granted (Rule 12 (b), Rules of Civil Procedure, 28 U. S. C. A., foll. Sec. 723c) was argued, briefed and sustained by the District Judge (R. 38, 40, 30 Fed. Supp. 909).

Petitioner was allowed to amend. The complaint, as amended, is printed in the record (R. 6). "Exhibit A" was made part of same (R. 14, 3) and was before the Circuit Court of Appeals and is before this Court as an original, separate exhibit. The same is true of "Exhibit B" (R. 16). "Exhibit C" was made part of the complaint (R. 29).

The amendments consisted in showing the date that employees were "cut off", Article IV (R. 7), and in adding Article IV-A (R. 10), and in adding Article VII-A (R. 16), and in amending Articles VII, VIII, IX and XII by including additional references to the rules of February 9, 1931, as having been a "confirmation" or "carrying forward" of the seniority rights of the contract of August 1, 1929.

The same exception of failure to state a cause of action on which relief could be granted was applied as if refiled,

to the amended complaint (R. [illegible]-58). After hearing, argument and filing of briefs, the Court again sustained the exception and dismissed the suit and judgment was signed accordingly (R. 59-63, 32 Fed. Supp., 89).

On appeal to the Circuit Court of Appeals, that Court affirmed (119 Fed. (2d), 509).

The complaint is a long, argumentative paper. As observed by the Circuit Court of Appeals, it abounds in "redundancies, prolixities and inconsistencies" and in "confused and confusing allegations of fact and law". We think it will be in the interest of time and clarity to refer to it as we proceed, but we attempt here to summarize.

From the allegations, Exhibits and prayer it seeks:

(a) To have the employees named in the complaint reinstated under the seniority of the 1929 contract, or under same as "carried forward" by the 1931 rules, thereby ousting the employees of the same crafts, represented by the same petitioner (see "Exhibit B", p. 44), who have done this type of work for respondent during all or the greater part of the last decade.

(b) To recover wages for unperformed work over this period that will "greatly exceed" $100,000.00.

(c) To do this in the face of the allegations that show that this is a dispute *between employees* of which the National Railroad Adjustment Board has no jurisdiction (Article IV-A, R. 10; Article VIII, R. 19; close of Article VII, R. 16; (e), R. 27; Railway Labor Act, 45 U. S. C. A., Section 153 (i)). And see Appendix A of this brief.

(d) To do this in the face of the allegations that show that the 1929 contract was abrogated in 1931 under the use of the provisions of the applicable Railway Labor Act of May 20, 1926 (c. 347, 44 Stat., 577), particularly Sec. 5 (e), Sec. 6 and Sec. 7, First (R. 14, Article VII).

Virginian Ry. Co. v. *System Federation No. 40*, 300 U. S., 515, 548, 81 L. Ed., 789, 799;

And in the face of termination under the thirty day provision of the contract ("Exhibit A", p. 18; R. 50, 30 Fed. Supp., 913; R. 94, 119 Fed. (2d), 514).

(e) To do this in the face of the allegation in Article IV-A concerning those furloughed up to February 7, 1931:

> "* * * The rules of February 9, 1931, and the so-called rule of September 1, 1931, were not and did not purport to be applicable to these men, * * *." (R. 11)

And in the face of the allegation concerning one or two men furloughed between February 7, 1931, and September 1, 1931:

> "* * * the purported rule of September 1, 1931 was not and did not purport to be applicable to these men, as is later shown, and could not be applicable to them, because they were no longer in active service with the company, their seniority rights having been previously fixed." (R. 11-12)

(f) To do this in spite of the closing paragraph of the 1937 agreement ("Exhibit B", p. 43, and R. 16), covering all understandings then in effect. (See sentence bottom R. 25.)

(g) And to do so although the National Railroad Adjustment Board actually found there was no dispute pending and unadjusted on June 21, 1934 (R. 36, R. 48, 30 Fed. Supp., 913), and did not even determine what men were entitled to relief or make an award in favor of anybody (R. 36, R. 93, 119 Fed. (2d), 513).

III.

Answer to Petitioner's Reasons for Allowance of the Writ.

There are five alleged (pp. 6 *et seq.* of petition). The first two, that the jurisdiction of the Board has been restricted too much, are invalid. Whatever might be the justification in some other case, there is no question of public interest presented here and no case calling for the exer-

cise of this Court's supervisory powers to pass on the jurisdiction of the Board, because petitioner *disregards* and, therefore, misstates the underlying reasons for the holding below. Those reasons are, that the allegations and Exhibits made part of the complaint affirmatively establish, that the 1929 contract was terminated in 1931 under the use of the provisions of the applicable 1926 Act and under its own 30 day provision; that the matter presented to the Board in 1938 was the interpretation of the 1929 agreement and that, no matter how wide its jurisdiction, manifestly there was not and could not be any dispute or case pending and unadjusted or even existing in 1934 or 1938 which could be presented to that Board or which could be made the basis of a suit for relief in Court; that the 1937 agreement recognized the termination in 1931 and that it superseded the 1931 rules and covered all understandings; that the Board did not find as a *fact* that there was any dispute pending and unadjusted over which it had jurisdiction; and that the granting of the relief prayed for would displace the legitimate employees of the last eight or ten years, under the 1931 rules and the 1937 contract, whose status and seniority were fixed by the 1937 contract wherein *all the shop craft employees* were represented by this petitioner.

The third, that the functions of the Board are hindered because the Court holds that it must make definite and certain findings of fact, is also invalid.

The law gives the findings the effect of prima facie evidence. Could this be without *precise* findings? Under similar language of the Interstate Commerce Act, this Court requires certain standards for findings, including the amount of damages.

Meeker v. *Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed., 644.

Mills v. *Lehigh Valley R. Co.*, 238 U. S. 473, 59 L. Ed. 1414.

The Court below was right, *BUT*

(a) Petitioner, although allowed to amend, stands on the award as made.

(b) *Notwithstanding that,* the Court said that the suit properly should have been stayed until the Board could make findings *but for the fact that* there was no pending and unadjusted case on June 21, 1934, of which the Board had any jurisdiction (as the Act requires), and no cause or right of action for an award of the Board or a judgment of Court, for the reasons and on the grounds we have outlined above.

The fourth alleged reason is not even good on its face. It disputes the definite finding of fact as to the pleadings made by two courts and four judges below. It presents no cause for review.

> *General Talking Pictures Corp.* v. *Western Electric Co.,* 58 S. Ct. 49, 304 U. S. 175, 82 L. Ed. 1273, Headnotes 2 and 3.

Besides it *disputes* its own allegation as to the *sole reason* why re-employment allegedly was refused (middle R. 19).

As to the Rules of Civil Procedure, Rule 12 (b) permits the raising in advance by motion of a plea of no cause or right of action and Rule 12 (d) requires that it be heard in advance, on application, unless the Court orders deferment.

> *Federal Rules of Civil Procedure,* 28 U. S. C. A., foll. Sec. 723c.

The fifth ground is not covered by the complaint, was not mentioned below, is not argued now, is evidently "lagniappe", and we disregard it.

> "1. The Supreme Court's consideration of a case will be limited to the questions presented by the petition for the writ of certiorari."
>
> *Crown Cork & Seal Co., Inc.* v. *Ferdinand Gutmann Company, Inc.,* 304 U. S. 159, 82 L. Ed., 1265.

IT IS THEREFORE CLEAR THAT THE COURT BELOW HAS NOT SUBSTITUTED ITS JUDGMENT FOR THAT OF AN ADMINISTRATIVE AGENCY, NOR IS THERE JUSTIFICATION FOR PETITIONER'S CRITICISM OF THE LOWER JUDGES, THAT THEY ARE INDULGING IN "THE OUTWORN BELIEF" THAT IT IS THEIR DUTY TO SUBSTITUTE THEIR IDEAS OF WHAT THE LAW SHOULD BE FOR "THE LEGISLATIVE DECLARATION OF WHAT IT IS". THOUGH THIS COURT MAY NOT AGREE WITH EVERY STATEMENT OF THE DECISIONS BELOW, THE CONCLUSIONS AND JUDGMENT ARE CORRECT.

When the Court has reached this point, if it has any doubt that our position is sound, we ask that it read our enlargement of this answer, below.

IV.

The Writ Should Be Refused Because the Decisions of the Lower Courts Are Correct, the Complaint Does Not State a Cause of Action or Claim on Which Relief Can Be or Could Be Granted, and the National Railroad Adjustment Board Was Without Jurisdiction.

A.

The National Railroad Adjustment Board had no jurisdiction to attempt an award, because this is a dispute between employees.

Mr. Justice Brandeis once observed as to jurisdiction:

> " * * * Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist. * * *"
>
> *Lambert Run Coal Co.* v. *Baltimore & O. Ry. Co.*, 258 U. S., 377, 42 S. Ct. 349, at 351, 66 L. Ed., 671.

There is no open allegation that this is such a dispute, but the averments show that it is *really* and *necessarily*

such. See the averments. (Article IV-A, R. 10; Article VIII, R. 19; (c), R. 27; Article VII, R. 16; R. 34-11.)

The opening and closing pages of "Exhibit B" (separate exhibit) show that the 1937 agreement was with petitioner, representing respondent's shop craft employees. The closing provision is clear ("Exhibit B", p. 43).

Afterwards the clique in control tried to put a "fast one" over the legitimate employees by going before the National Railroad Adjustment Board with the stale claim that they were entitled to seniority under the 1929 agreement, and should displace their brethren. To make it more despicable, this petitioner represented *all* of these employees.

The Railway Labor Act, 45 U. S. C. A., Section 153 (i), gives the National Railroad Adjustment Board jurisdiction over "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934". They are the disputes that can be handled with operating officers and then taken before the Adjustment Board. On them, if there be an award, the carriers may be sued under the advantageous conditions of (p).

There would be such a case, *e. g.*, if this respondent had violated the seniority provisions of the 1937 agreement. Such violation would be against the rights of every employee who is a party thereto. A case could be laid.

But this is no such case. It is internecine strife. And the Courts are solemnly called on to approve the wrong. Is it possible to say the Circuit Court of Appeals was wrong when it stated, with reference to petitioner's contention under the 1929 contract, "The result of this theory is the claim, that though most of those named have not worked for the company during the past ten years, they must not only be now paid for all of that time as though they had, but must be permitted to displace others who have been and were, working, as employees of the company under the 1931

rules and amendments, when the 1937 contract was signed, and whose seniority, as established and fixed by those rules, was settled and confirmed by the contract. This will not at all do."?

(R. 94, 119 Fed. (2d), 509, 514)

A similar attempt was made in *Stephenson* v. *N. O. & N. E. R. Co.* (Miss.), 177 Sou., 509. There was a dispute between employees over seniority rights. One group took the matter before the Board as a dispute against the railroad and got an award. On the suit of the other employees, the Court, in a well-reasoned opinion, held that the Board was without jurisdiction.

The same holding was made in *Long* v. *Van Osdale* (Ind. App.), 26 NE (2d), 69.

As persuasive, see *Nord* v. *Griffin*, 86 Fed. (2d), 481, writ denied, 81 L. Ed., 879.

We direct the Court's attention to Appendix A of this brief.

Since the Board has no jurisdiction of disputes between employees, only the courts can settle them in cases where all parties are before the Court.

National Licorice Co. v. *National Labor Relations Board*, 309 U. S., 350, Headnote 8, 84 L. Ed., 799.

B.

The Board had no jurisdiction and there is no cause of action because the 1929 contract was abrogated in 1931.

The 1929 contract was terminated in 1931:

(a) under the provisions of the 1926 Act (c) 347, 44 Stat. 577.

See allegations of petitioner, Article VII of its complaint (R. 14), showing affirmatively that this agreement remained in effect without objection until September 15, 1930, when respondent served notice

on petitioner of its desire to abrogate and revise the schedule of rates of pay and working conditions of the shop craft employees, and that pursuant thereto conference was held on October 1, 1930, at which respondent submitted a new wage scale and draft of new rules; that no agreement was reached and on October 4, 1930, petitioner invoked the services of the Board of Mediation, which worked at the matter until February 6, 1931, when it suggested that the parties submit the matter to arbitration; that this suggestion was accepted by petitioner, but rejected by respondent; and that immediately thereafter respondent promulgated the rules of February 9, 1931, to govern employment in its shops thereafter, and that it thereafter amended the seniority rule on September 1, 1931.

See Secs. 6, 5 (c) and 7 of that Act.

See discussions and quotations by the District Judge (R. 44 and 51, 30 Fed. Supp., 911 and 914).

And see repeated statements in *Virginian Ry. Co.* v. *System Fed. No. 40*, 300 U. S., 515, 81 L. Ed., 789, at 799, 805 and 806. At 799 it is said:

"* * * The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First."

Virginian Ry. Co. v. *System Fed. No. 40*, 300 U. S., 515, 81 L. Ed., 789, 799.

"* * * For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. * * *"

Moore v. *Illinois C. R. Co.*, October Term 1940, 85 L. Ed. Advance Opinions, No. 11, 722, 725.

(b) under the 30 day provisions of the 1929 contract.

See separate "Exhibit A", p. 18, and R. 50, 30 Fed. Supp., 913.

Leschen & Sons Rope Co. v. *C. T. Patterson & Co., Ltd.*, 130 La., 557, 58 Sou., 336.

See statement of Court below, R. 94, 119 Fed. (2d), 514.

And see petitioner's specific recognition of such termination in the agreement of October 20, 1937:

"These General and Special rules constitute the Agreement between the Louisiana & Arkansas Railway Company and its shop employees represented by System Federation No. 59, Mechanical Section, Railway Employes Department, American Federation of Labor, covering rules, working conditions and rates of pay, and covers all understandings now in effect, and supersedes rules posted February 9th, 1931, and will remain in effect until after thirty (30) days written notice served by one party on the other, or in accordance with procedure outlined by the Railway Labor Act."

"Exhibit B", p. 43.

In a brief filed by Mr. Frank L. Mulholland and others in Civil Action File No. 1165, in the District Court of the United States for the District of Columbia, *The Washington Terminal Co.* v. *F. E. Boswell, et al.*, it is stated at p. 53:

"Although the statute speaks of the action as one to enforce an order of the Board, and although the procuring of such an order is undoubtedly a prerequisite to the use of the statutory procedure, it is apparent that the mere existence of the order in no sense establishes that the plaintiff in such a suit has a cause of action. He must plead more than the order. He must prove more, and a judgment of enforcement by no means follows as a matter of course from the order's issuance. *His cause of action before the Court is dependent upon the agreement, out of the interpretation of which, the alleged dispute arose.* The existence of the order of the Board merely assists him in preparing and proving that cause of action." (Emphasis ours)

Undoubtedly this is a correct statement of the law. The Railway Labor Board is a very limited body as compared, e. g., to the National Labor Relations Board.

Mr. Mulholland's firm was on the complaint here, but is not on this application for a writ.

Such a contract does not give an indefinite tenure. Its rights and obligations cease when it ends. There could be no breach of it by an act done after it has terminated.

Aside from common sense and the general law of contracts, the authorities agree that rights under such contracts terminate when the contract ends. There could hardly be a better or more correct statement than that of the Circuit Court of Appeals in the fourth from last paragraph of the opinion (R. 97, 119 Fed. (2d), at 515).

The ruling is supported by the very case petitioner relies on: *Nashville C. & St. L. Ry. Co.* v. *Railway Employees Dept. of A. F. of L.*, 93 Fed. (2d), 340, cert. denied, 303 U. S., 649, 82 L. Ed., 1110. The Court maintained the position that men under an *agreement*, temporarily laid off, retain their seniority rights and "the employer-employee relationship, with mutual rights and obligations, *until in pursuance of its terms it is finally ended.*" (Emphasis ours)

> 93 Fed. (2d), at 342.

Also by *Y. & M. V. R. Co.* v. *Webb*, 64 Fed. (2d), 902, 904:

> "* * * But the employment though indefinite as to time is a relationship *while it lasts*, and is subject to the conditions fixed in the working agreement for the industry. * * *" (Emphasis ours.)
>
> *Y. & M. V. R. Co.* v. *Webb*, 64 Fed. (2d), 902, 904.

and by *Illinois C. R. Co.* v. *Moore*, 112 Fed. (2d), 959, 966 (17), reversed on the point of not following the Mississippi Court; and by *Stephenson* v. *N. O. & N. E. R. Co.* (Miss.), 177 Sou., 509, at 514.

The effort to make it appear that the Court held that a furloughed employee is not an employee is simply a

"mare's-nest." What the Court held is set out in the last four paragraphs of the opinion and we ask this Court to read same as a refutation of this argument.

Respondent's very position is that men furloughed before February 7, 1931, were employees and bound by the proceedings that terminated the 1929 contract.

As to the attempt to tie the 1929 contract to the 1931 rules, the allegations themselves actually repudiate the idea. (R. 11, R. 11-12.)

C.

There is no allegation of a breach of the 1929 contract while it existed or of the February 7, 1931, rules before their amendment.

Petitioner bases the seniority claims on Rules 8, 9 and 12 of the 1929 contract and similar provisions of the 1931 rules (R. 14, 17, 18). Rule 9 (separate "Exhibit A", p. 3) reads:

> "When forces are reduced seniority is to govern when force is increased, men laid off will be given preference in re-employment, in the order of their seniority, if available within ten (10) days."

There is no allegation in the complaint that any furloughed employee was denied re-employment under the ten day rule or otherwise during the existence of the 1929 contract or during the existence of the 1931 rules, prior to their amendment. The complaint, notwithstanding Article IV, sets out in Article VIII (R. 19) that petitioner does not know the dates when the furloughs took place; and in the same Article (R. 19-20) that it does not know the dates when the positions of said employees were given to other persons. In the same Article (R. middle 19), it is alleged that respondent gave as its *sole reason* (emphasis ours) for not replacing furloughed men the one year after furlough rule of the September 1, 1931, amendment. Since said reason could not possibly have been applied before the amendment was adopted, this affirmatively shows that

there is no allegation of any breach of the ten day rule or otherwise under either the 1929 contract or the 1931 rules prior to the date of the amendment. It shows affirmatively that any refusal to re-employ them was subsequent to said date and, therefore, is necessarily based on the alleged breach of the contract, which breach allegedly took place long after the contract, with all of its rights, had terminated.

In Article IX (R. 20), it is stated that after new employees were given positions, some of the furloughed employees requested reinstatement under the 1929 contract *as carried forward* (emphasis ours) by the February 9, 1931, rules. There is not the remotest allegation, however, that anyone of them was refused reinstatement under the ten day rule or otherwise during the time of the existence of such rule.

D.

An award was sought exclusively on the 1929 contract. All seniority rights thereunder and all rights to re-employment thereunder having terminated in 1931, there was no justiciable dispute before the Board in 1938, and none pending and unadjusted in 1934. There was no jurisdiction in the Board, and no right of action here has been or can be stated.

Petitioner alleges (R. 22) that *after* the new agreement of October 20, 1937, it endeavored to settle what it calls the long pending dispute "as to the *interpretation of the Agreement* of August 1, 1929" (emphasis ours) by conferences with the respondent in accordance with the Railway Labor Act, and applied to the National Railroad Adjustment Board for the settlement of *said* dispute. The award shows that it sought the settlement of a dispute arising from the alleged violation of the agreement of August 1, 1929, and contended that the rules which the railroad company had posted were *arbitrary* (R. 29, bottom R. 35).

Petitioner nowhere alleges any handling of a dispute under the rules of February 9, 1931, or under such rules as

amended. The requirement that relief be sought up through the highest operating officer of defendant was a prerequisite of an appeal to the Adjustment Board.

Illinois C. R. Co. v. *Moore,* 112 Fed. (2d), 959, 966.

There is no pretense in any allegation that there was a dispute under the relationship created by the rules of February 9, 1931, or under such rules as amended or that any such claim was taken to the Adjustment Board. The contract of 1929 having been terminated and superseded, and there being no allegation of any breach thereof during the time of its existence, or that during its existence any employee named was refused re-employment under the 1929 agreement, the amended complaint fails to state a cause of action.

E.

The contention of petitioner that the jurisdiction of the Board has been too narrowly construed is groundless.

The National Railroad Adjustment Board was created by the Act of June 21, 1934 (45 U. S. C. A., Sec. 153). Subsection (i) states its jurisdiction.

A Federal statute, including one governing procedure, as here, should not be construed to act retrospectively unless its language be so clear as to admit of no other construction. In the absence of express command or unavoidable implication, such statutes operate upon the future only.

U. S. v. *St. L. S. F. & T. R. Co.,* 270 U. S., 1, 70 L. Ed., 435. Mr. Justice Brandeis was the organ of the court.

The Act here must be held, therefore, to give jurisdiction to the Adjustment Board in prior cases only *where cases were pending and unadjusted on June 21, 1934.* This section certainly makes the Act prospective otherwise.

However wide a construction is claimed, it can hardly be claimed in reason that the Board had jurisdiction to con-

strue the rules and working conditions of a contract terminated years before its creation. *This was the real basis of the holdings below, and its soundness is unimpeachable.*

The contract, after notice and conference, had been before the Mediation Board which had concluded its four months' labor. Arbitration had been declined. As the Mississippi Court said in the *Stephenson* case, 177 Sou., at p. 515:

> "* * * The dispute may have been 'unadjusted,' but it was not 'pending' before any board or tribunal at the time of the enactment of the Railway Labor Act of 1934. * * *"
>
> *Stephenson* v. *N. O. & N. E. R. Co.*, 177 Sou., 509, 515.

It may be noted that this decision agrees with the Courts below.

We direct particular attention to the fact that both Courts below based their holdings partly on the *actual* finding of the Board that this matter was not within its jurisdiction.

> "There is evidence that a dispute existed on this railway to the extent that the President appointed a fact finding commission to report on the same, and while the case in question is not one which the fact finding commission investigated, it is one of the instances growing out of this dispute. *Therefore*, the claim was pending and unadjusted June 21, 1934." (Emphasis ours) (R. 36)

Said the District Court:

> "This is too far-fetched in inference in 1938, based upon a law of 1934, to keep alive a contract born in 1929, definitely closed in 1931. We cannot accept such a finding or conclusion of law, unsupported by the facts, to form a cause of action in this suit.
>
> "Besides, the above paragraph confesses its own weakness; 'the case in question is not one which the fact finding commission investigated'; the 'case in question' is plaintiff's present cause of action in this very suit. Therefore, the President's Fact Finding

> Commission did not consider at all these plaintiffs and their supposed cause of action."
> (R. 48, 30 Fed. Supp., 913.)

See similar comment, 119 Fed. (2d), 513, R. 92.

In an effort to get the writ, petitioner now argues that the Board has unlimited jurisdiction of all disputes, of whatever ancient vintage, involving whatever contracts, and that they did not have to be pending and unadjusted cases on June 21, 1934, as the Act requires. This is an "about face". The complaint labors to establish that there was such a dispute on that date (R. 11, twice; first half of R. 21). This last citation shows clearly that petitioner construed the language of the Act to be a limitation and not an extension. It also shows the theoretical and gossamer-like nature of the contention.

Dictionary definitions do not appear particularly helpful. The word "include", of course, often enlarges as " 'persons' shall include corporations". So it was in the cited *Marotta* case, 287 U. S., 513, 77 L. Ed., 466. Mr. Justice Butler arrived at the meaning by considering terms used twenty-nine times in the Bankruptcy Act.

On the other hand, it often means that it forms a part of the genus. So it was in the cited *Montello* case, 221 U. S., 452, 55 L. Ed., 810.

Neither these cases nor any others cited show that the decision of the Court of Appeals is contrary to the "rationale" of this Court's decisions, using petitioner's indefinite language.

There is now a "hue and cry" that the persons named in the complaint had no way to state a case. The argument overlooks or intentionally disregards several facts:

(a) The contract had been terminated for several years.

(b) Petitioner was not the employees' representative because no new contract could be reached.

(c) Men furloughed after February 7, 1931, had no claim under the contract.

(d) There is no allegation that any furloughed employee sought at any time to exercise the privilege of Rule 15, Contract of 1929 ("Exhibit A", pp. 4-5).

(e) There is no allegation that any such employees took steps to secure a conference under the rules. Petitioner did not even make the rules a part of its complaint.

(f) The furloughed men did not present the matter to the President's Fact Finding Commission (R. 36).

(g) There is no allegation that respondent did not have its operating officers, or that any employee did not have access to them, or that there was any effort, prior to June 21, 1934, to state their claims to such operating officers.

F.

Nor is there merit in the contention that there was an award here under the terms of the Act.

Petitioner made no effort to secure a re-reference. It stands on the alleged award. In fact there could not have been any interpretation of facts that were never found.

The Board did not even find what men should be reinstated or that any particular man should be. Apparently some were not named in the submission.

> "The list of men affected, as submitted by the employes, was not complete, and this Division is unable to determine thereby those who are entitled to relief under the contention made by the employes. This, therefore, is a matter for both parties to the dispute to check and determine those who are entitled to such relief." (R. 36)

These findings are generalizations and not definite findings of fact and final awards as contemplated by the Act and such as to be prima facie evidence (Sub-sections (m), (o) and (p)).

The time lost is not fixed for any man.

The amount due any man is not fixed but respondent was ordered *November 21, 1938,* to pay them by *January 1, 1939.*

This is not an award as required by (m). It cannot be said to be in writing. It is monstrous to say that it is *final* and *binding*. It does not fix the sum to which anyone is entitled under (o). It is a travesty to say that it is *prima facie* evidence of facts under (p). (p) says: "prima facie evidence of the facts therein stated".

It does not find ultimate facts even. What is the object of a hearing before the administrative board and the giving of its findings *prima facie* evidentiary effect, if it is not to state precise and definite facts?

The random cases cited are not persuasive that this is an award under the Act. More pertinent are *St. Patrick* v. *Dakin*, 1 Rob. (La.), 202, 206, citing *Carnochan* v. *Christie*, 11 Wheaton, 446, 6 L. Ed., 516.

The two cited cases relating to the Interstate Commerce Act, *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S., 412, 59 L. Ed., 644, and *Mills* v. *Lehigh Valley R. Co.*, 238 U. S., 473, 59 L. Ed., 1414, do not sustain the petitioner in any sense. They hold that under that Act it is not necessary to set out the evidential facts, but it is necessary to set out the ultimate facts, including the amount of damages. See the findings and orders to the extent they are copied and see the standard of facts (59 L. Ed., at p. 656, quoted at p. 1417). The award and order here fail utterly to meet this standard.

The statement of Judge Hutcheson (R. 93, 119 Fed. (2d), at 513) is eminently correct. *BUT*, see also, top R. 94, the reasons why there should have been no re-reference here.

G.

The 1937 contract, made part of the complaint, destroys any cause of action.

The petition to this Court makes no pretense (as indeed it could not) of avoiding the effect of the 1937 contract, which alone shows that no cause of action has been or could be stated.

The 1937 contract ("Exhibit B") demonstrates (a) that it constituted on and after October 20, 1937, the only contract between the shop craft employees, represented by petitioner, and respondent; (b) that it covered all understandings in effect on and after such date; (c) that it superseded the posted rules of February 9, 1931, (d) thereby disposing finally of any complaint there could have been under such rules, and (e) thereby disposing finally of any complaint there could have been under the 1929 agreement "carried forward" or "confirmed" by the posted rules; (f) that petitioner recognized that the 1931 rules had superseded the 1929 contract; (g) that, IF employees furloughed prior to February 9, 1931, remained employees after the 1929 contract was terminated and superseded, then any former complaint was finally disposed of; and (h) that on and after October 20, 1937, seniority was determined in a manner different from and inconsistent with the 1929 contract and the 1931 rules.

On (h), see Rules 25, 26, 27 and 28. ("Exhibit B," pp. 9-11)

Aside from the expressed agreement of the parties in the closing paragraph of "Exhibit B" (p. 43), the terms of the new contract were so inconsistent with the rules of 1931 and the 1929 agreement that they were discharged as a matter of law.

Wiley v. *Dixie Oil Co.*, 43 Fed. (2d), 51.
Luster v. *Gilruth*, 60 Fed. (2d), 751, 755-756, writ of certiorari denied, 77 L. Ed., 570.
U. S. ex rel. v. *Lamont*, 155 U. S., 303, 39 L. Ed., 160, 164.
Perkins v. *Frazer and Nason*, 107 La., 390, 394, 31 Sou., 773.

H.

Whatever seniority rights shop craft employees had under the 1931 rules did not arise because of any contract between petitioner and respondent. Petitioner was not a party thereto. Neither the Railway Labor Act nor the gen-

eral law gives petitioner a right of action for the reinstatement of such employees or for the recovery of back-pay for them. Such employees would necessarily have to bring their own suits. This applies to all employees who worked under the rules and to all the prior employees under the allegations of the amended complaint that seniority under the 1929 contract was carried forward or confirmed by virtue of the 1931 rules. The closing paragraph of the Court of Appeals correctly states the matter. (119 Fed. (2d), 516, R. 97-98)

It is respectfully submitted that the application should be refused.

Respectfully submitted,

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